It was common ground that the statute applicable in this case is the Contracts (Malay States) Ordinance 1950 (see *Newington Local Board* v. *Cottingham Local Board*[1]), and the Federal Court decision in *Tan Mooi Liang* v. *Lim Soon Seng*[2] is good authority for the proposition, as his Lordship held, that notwithstanding section 5(1) of the Civil Law Act 1956, the English Law of Partnership will not apply, even if the Contracts Ordinance 1950 is silent on the issues in dispute.

Construing the agreement on the principle of the intention of the parties thereto, the learned trial judge held that in consideration of giving him sole proprietorship of the business, the appellant had agreed to buy the respondent's rights and shares in the partnership, and the latter agreed to retire. He held that there was no conflict between the recital to the agreement and the operative parts.

On the second issue, his Lordship held that the agreement of sale was enforceable. Since respondent had kept his part of the bargain, the learned judge held that he is contractually entitled to enforce appellant's part of the bargain contained in Clauses (2) and (3) of the agreement.

In the result he gave judgment to the respondent as prayed in prayers (1), (2), (3) as amended, (5) and (6) of the statement of claim, and also ordered Messrs. Peat, Marwick, Mitchell & Co. of Kuala Lumpur to continue as accountants for the purpose of prayer (1) until further order with liberty to appellant to falsify and surcharge the accounts.

Before us Mr. Sethu for the appellant again conceded that the partnership is a partnership at will, that the law applicable is the Contracts (Malay States) Ordinance 1950, and that the English partnership laws do not apply.

We were referred to an Indian Supreme Court decision *Addanki Narayanappa & Anor.* v. *Bhaskara Krishnappa,*[3] at page 1304 where the following passage appears:

"As already stated his right during the subsistence of the partnership is to get his share of the profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from the partnership of the value of his share in the net partnership assets *as on the date of the dissolution or retirement* after a deduction of liabilities and prior charges."

It was indicated to us that the Indian Act like the English Act has provision for sale of a share in a partnership whereas our Contracts (Malay States) Ordinance 1950 has no such provision. This same objection was raised without success in the court below. At pages 46/47 of his judgment, the learned trial judge has this to say about the present case,

"... by the Agreement Exhibit P1, the parties did not only agree that the plaintiff should retire and thereby dissolving the partnership on September 30, 1969, but they also agree that the business of the partnership should continue and that the defendant should be the sole proprietor of Times Educational Company and, for this, the defendant should pay the plaintiff in accordance with Clause 2 and Clause 3 of the Agreement, i.e. on the basis of the financial standing of the defendant's sole proprietorship as at March 31, 1970."

Referring to the Agreement Mr. Sethu says that Clause 2 is independent of Clause 1. He adds that the operative part of the agreement is important and that where there is conflict, as he submits there is, in this instance, between the two clauses, then the 1st clause would prevail. (See *Forbes* v. *Git & Ors.*[4]).

On this point we are in complete agreement with the learned trial judge's view of the agreement contained in the following passage in his grounds of judgment.

"The intention of the parties is clearly expressed in the second recital to the agreement, where it is stated that the plaintiff is desirous of withdrawing from the partnership *and* to sell his rights and shares in the partnership to the defendant. There is no conflict between the recital and operative parts. Clause (1) contains the plaintiff's obligation and it refers to the plaintiff's withdrawal from partnership in the first part of the second recital. Clause 2 and Clause 3 set out the price or consideration for the sale as intended in the second half of the second recital. By these two clauses, it is also clear that the buying price which the defendant has to pay to the plaintiff, is based on the financial standing of the defendant's sole proprietorship in the business as at March 31, 1970, and not as on the date of plaintiff's retirement on September 30, 1969."

With regard to the interest awarded in the court below under prayer (1), appellant complains that the obligation to pay only arises upon ascertaining the amount due after taking of accounts, so that interest should only become payable after that date. We take the view that appellant had the use of respondent's share of the money to which he was entitled from April 1, 1970, and that that should be, as the trial judge ordered, the day from which interest should be payable.

We therefore dismissed the appeal with costs and ordered that appellant's deposit be paid to the respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Azman, Davidson & Co.; Chew & Co.*

LEE POH CHOO v. S.E.A. HOUSING CORPORATION SDN. BHD.

[O.C.J. (Mohamed Dzaiddin J.C.) March 24, 1981]

[Kuala Lumpur — Civil Suit No. 2962 of 1967]

Contract — Building Contract — Building not completed within eighteen months after date of contract — Breach of statutory rules — Damages — Set-off — Housing Developers (Control and Licensing) Rules, 1970, rr. 12 & 13 — Housing Developers (Control and Licensing) Act, 1966, s. 24.

Housing Developers — Building completion delayed — Whether circumstances beyond control.

In this case the plaintiff sued for damages for breach of contract and for delivery of documents of title relating to land and house in Petaling Jaya. The plaintiff had agreed to purchase the property from the defendant and it was a term of the agreement that the building on the said property should be completed within a period of eighteen months from the date of the agreement. The building was only completed some twenty three months after that date. The defendants claimed that the non-fulfilment was caused by circumstances beyond their control. The issues in dispute between the parties were as follows:—

1. Do the Housing Developers (Control & Licensing) Act 1966 and 1970 Rules apply to this case. If they do, can the defendants contract out of the Act and the Rules?
2. What is the position of the defendants under the Common Law?
3. Can the plaintiff set off the last payment of the purchase price against liquidated damages?

4. Was the plaintiff in breach for non-payment of the last instalment of the purchase price?

5. Is the plaintiff entitled to special damages at $2,400 per month being rental?

Held: (1) the Housing Developers (Control and Licensing) Rules, 1970, apply in this case and the defendant was in breach of the statutory provisions of the rules;

(2) the Housing Developers (Control and Licensing) Act, 1966 and the Rules were introduced for the public to regulate and control the business of housing developers and must be strictly followed;

(3) the defendants could not contract out of the statutory provisions of the 1970 Rules;

(4) the defendants have failed to prove that the delay in this case was due to circumstances beyond their control and therefore the plaintiff was entitled to damages as provided in the contract;

(5) the plaintiff has a right to set-off the last payment of the purchase price against the liquidated damages;

(6) the failure of the plaintiff to pay the balance of the purchase price did not amount to a repudiation of the contract;

(7) the plaintiff had failed to prove her loss of use and occupation of the building by way of rental.

[Affirmed by the Federal Court]

Cases referred to:-

(1) *Johnson & Anor.* v. *Moreton* [1978] 3 All E.R. 37.

(2) *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.* [1978] 2 M.L.J. 239.

(3) *Hanak* v. *Green* [1958] 2 Q.B. 9.

(4) *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.* [1967] 1 M.L.J. 223.

(5) *Gilbert Ash (Northern) Ltd.* v. *Modern Engineering (Bristol) Ltd.* [1973] 3 All E.R. 195.

(6) *Alliance (Malaya) Engineering* v. *San Development* [1974] 2 M.L.J. 94.

(7) *Bonham-Carter* v. *Hyde Park Hotel* [1948] 64 T.L.R. 177, 178.

(8) *Sum Kum* v. *Devaki Nair & Anor.* [1964] M.L.J. 74.

CIVIL SUIT.

R.R. Sethu for the plaintiff.

D. Lingam for the defendant.

Cur. Adv. Vult.

Mohamed Dzaiddin J.C.: This is a claim by the plaintiff for damages for breach of contract, and for delivery of Issue Document of Title and vacant possession in respect of a piece of land measuring in area 1,680 sq. ft. known as Lot No. 25602 together with a permanent building described as a three-storey shophouse plus mezzanine floor in phase 5 for SEA Park, Petaling Jaya, Kuala Lumpur (hereinafter referred to as "the said property") and other consequential loss.

Briefly, the facts of the case are as follows. On January 2, 1974 by a written agreement AB1 the plaintiff agreed to purchase from the defendant the said property at the purchase price of $175,000. Under the said agreement the defendant was to complete the said building on the said property within a period of 18 months from the date of the said agreement, i.e. on or before July 1, 1975. In the meantime the plaintiff continued to pay the purchase price progressively and there was a balance of 10% being the last payment due and payable by her to the defendant upon the issue of the Certificate of Fitness. It is a fact that the said building was not completed within the period stipulated in the agreement. It is a term of the said agreement that the defendant should pay liquidated damages at the rate of 8% per annum on the purchase price for any delay in the completion of the said building up to the date of actual completion and delivery of possession.

The following sequence of events ensued. By a letter dated June 16, 1977 AB28 the defendant wrote to the plaintiff notifying her that the said building has been completed and the Certificate of Fitness was ready for collection. The defendant demanded from the plaintiff payment of the balance amounting to $17,500 being the final instalment of the purchase price and $407.20 being the quit rent for a period of 4 years.

Upon receipt of the abovementioned letter, the plaintiff replied as in AB26 and pointed out to the defendant that under Clause 17 of the Purchase Agreement the building was to be completed within 18 months from the date thereof and yet the said building was only completed on June 16, 1977. Further, the plaintiff enquired whether the defendant had obtained any extension of time from the Controller of Housing and alleged that in the event that no extension was given by the Controller she was entitled to liquidated damages at 8% per annum on the purchase price which according to her calculation amounted to $27,826.66, i.e. from July 2, 1975 to June 1, 1977.

The plaintiff further stated in the said letter that the balance of $17,907.20 which was payable by her being the final balance of the purchase price was far below the amount which she would be entitled as liquidated damages. Therefore she suggested the defendant should hand over the keys together with the payment of $9,919.46. The defendant replied on August 15, 1977 AB28 and requested the plaintiff to call at the office to discuss the matter. In the meantime, on August 13, 1977 the plaintiff's solicitors wrote to the defendant AB27 and informed the defendant that their client was entitled to set off against the balance of the purchase price liquidated damages due to the plaintiff under the said Purchase Agreement and demanded the defendant to hand over the key together with payment of $9,919.46.

Subsequently, the defendants instructed their solicitors who by a letter dated September 23, 1977 AB34 *inter alia,* stated as follows: —

"2. Our client instructs us that the payment of the balance of the purchase price to our client and the delivery of the keys and premises by our client and your client's claim for damages for alleged delay are two entirely separate issues. We are instructed to give you notice, which we hereby do, that if your client wishes to obtain delivery of the keys to the premises, she must immediately pay all outstanding sums to our client. If she does not do so, she will be held fully responsible for any delay in the delivery of the keys to her.

3. With regard to the entirely separate issue of your client's claim for damages for alleged delay in the completion of the three storey shophouse, our instructions are as follows.

4. Our client instructs us that it denies any liability to pay any damages for the delay in completion alleged by your client. We are instructed to draw your client's attention to the provisions in the Sale and Purchase Agreement including clause 32. Our client instructs us that the alleged delay in the delivery of vacant possession, if any (which is hereby denied), was caused by circumstances beyond the control of our client. Apart from the acute shortage of contractors, sub-contractors, skilled and semi-skilled labour and construction workers during part of the relevant stage of the construction, there was also at the relevant time a general short-

age of building materials particularly cement. We are instructed that the acute shortage of contractors etc. referred to above was the result of unforeseen simultaneous commencement and development of several large housing estate in the neighbourhood of our client's development. This large scale Development in the neighbourhood increased the mobility of contractors etc. under the pressure of supply and demand and also created a shortage in absolute terms. With regard to the shortage of building materials, we are instructed that our client was compelled to import cement from oversea sources with the approval of the relevant authorities.

5. Our client instructs us that the schedule in clause 3 of the Agreement was adopted from the schedule given under the Developers Rules, which was ascertained subsequently to be generally applicable to the sale of link or terrace houses and strictly speaking was not intended for the sale of three storey shophouses which by the nature of their structure should reflect the different stages of the construction of a three storey shophouse. Despite the adoption of a schedule payment disadvantageous to our client, although our client could have applied to the Controller of Housing for a new schedule at the time of the drafting of the Sale Agreement, our client adhered to the original schedule.

6. In view of what is stated above our client instructs us that your client has no valid grounds to claim for damages for the alleged delay and our client denies any liability therefor."

On September 30, 1977 AB36 the plaintiff's solicitors replied stating as follows: —

"The issues are not separate. By reason of the delay in completion, our client is entitled to damages and what our client is saying is that she sets off the damages for delay against the sum due to your client and demands the payment of the balance of the damages. Both arise out of the same matter.

The reasons you have advanced cannot be a ground to deny our client's claim for damages for delay.

Our client quite justifiably, has instructed us not to waste time with you and your clients on this by further correspondence. Accordingly our client will issue a Writ of Summons against your clients. Do you have instructions to accept service."

Now, with regard to the pleadings the plaintiff alleges in her statement of claim that the said agreement is subject to the Housing Development (Control and Licensing) Rules, 1970. This is admitted by the defendants in paragraph 3 of the defence who further aver that the Common Law and other Statute Laws also apply. The defendants also admit that under the said agreement they were required to complete the said building within a period of 18 months from the date of the said agreement, that the plaintiff has paid 90% of the purchase price and that the defendants should pay the plaintiff liquidated damages at 8% per annum on the purchase price for any delay in completion of the said building. However, the defendants claim that they are protected by clause 32 of the said agreement whcih exempted the defendants from liability for non-fulfilment of any terms and conditions of the said agreement if such non-fulfilment was caused, *inter alia,* by circumstances beyond the control of the defendants.

From the pleadings and submissions of counsel, I find that the issues in dispute may be summarised as follows: —

1. Do the Housing Developers (Control & Licensing) Act, 1966 and 1970 Rules apply to this case? If they do, can the defendants contract out of the Act and the Rules?
2. What is the position of the defendants under the Common Law?
3. Can the plaintiff set off the last payment of the purchase price against liquidated damages?
4. Was the plaintiff in breach for non-payment of the last instalment of the purchase price?
5. Is the plaintiff entitled to special damages at $2,400 per month being rental?

There is no dispute that the defendants are a licensed housing developer, a very well-known one too. The Housing Developers (Control and Licensing) Act, 1966 defines "Housing Developer" as "any person, body of persons, company, firm or society (by whatever name described) engaged in or carrying on or undertaking a housing development or desirous of doing so." A "Licensed Housing Developer" means "any Housing Developer licensed under section 5 of the Act to engage in or carry on or undertake a housing development." Section 5 of the Act provides certain prohibitions against housing development except by virtue of a licence. It also provides provision relating to the grant of a licence.

Again it is important to note that under section 3, "housing accommodation" is defined as to include any building which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises. I hold as a fact that the building in this case is a housing accommodation.

The Housing Developers (Control and Licensing) Act, 1966 is an Act to provide for the control and licensing of business of housing development in West Malaysia and for matters connected therewith. Under section 24, the Minister may make regulations for the purpose of carrying into effect the provisions of the Act. Hence, the Housing Developers (Control and Licensing) Rules, 1970 was introduced and applied to such housing accommodation as in the present case.

Rule 12 of the 1970 Rules provides that every contract of sale which shall be in writing shall contain within its terms and conditions provisions as stated therein. The provisions are comprehensive. For the purpose of this case, the relevant provisions are rule 12(1)(o), (r) and rule 12(2). Paragraph (o) of rule 12(1) specifies that the date of delivery of housing accommodation to the purchaser shall not be later than 18 months after the date of signing of contract of sale.

Paragraph (r) of rule 12(1) provides that a licensed housing developer shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than 8% per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale.

It is clear that the provisions of rule 12(1) were incorporated in the Purchase Agreement AB1 made between the plaintiff and the defendants. Clause 17 corresponds with paragraphs (o) and (r) of rule 12(1). Again under rule 12(2) the Controller, i.e. the Controller of Housing appointed under section 4 of the Act is empowered to waive or modify such provisions

as provided in rule 12(1) in respect of any contract if he is satisfied that owing to special circumstances the compliance with any provision of this rule is impracticable or unnecessary. He may then give a certificate in writing. By implication of rule 13(1), it is for the housing developer concerned to apply to the Controller to waive or modify any of the requirements. The defence did not adduce any evidence to show that such application was made or a certificate was issued by the Controller. The defendants impliedly admit that the rules apply, although they say in paragraph 3 of their defence that the Common Law and other statute laws also apply. They do not deny the plaintiff's allegation. In view of the above, it is my judgment that the 1970 Rules apply in the instant case. The defendant was therefore in breach of the statutory provision of the Housing Developer (Control and Licensing) Rules, 1970.

As I have stated earlier the Housing Developers (Control and Licensing Act, 1966 and its 1970 Rules were introduced for public interest to regulate and control business of housing developers. In my opinion the Act and the rules must be strictly followed. Sections 7, 8 and 9 of the Act provide the liabilities and duties imposed on a licensed housing developer and failure to comply or perform any of the duties imposed would be an offence under section 19. Likewise, under rule 17 it is an offence for any developer who does not comply with the rules.

In *Johnson & Anor.* v. *Moreton,*[1] by a lease dated August 11, 1967 the tenant was granted a lease of a farm for 10 years from January 1, 1967. In the lease the tenant covenanted to give possession of the farm to the landlord immediately on termination of the tenancy "and not in any event to serve a counter notice under section 24(1) of the Agricultural Holdings Act, 1948." On November 27, 1975 the landlord served a first notice on the tenant under the same Act of their intention to terminate the tenancy. Contrary to the covenant in the lease, the tenant served a counter notice under section 24(1) above which had the effect of nullifying the first notice unless the Agricultural Land Tribunal consented to its operation. The landlord treated the counter notice as valid but served on the tenant a second notice to quit in the same term as the first but adding a notice that the landlord's interest in the farm had been materially prejudiced by a breach of the lease by the tenant. If effective, the second notice would have entitled the landlord to possession without the need to obtain the Tribunal's consent. *Held* — "The 1948 Act was to be construed in the light of the policy or objective of Parliament enacting it, namely that it was in the national or public interest to encourage efficient farming and good husbandry by conferring security of tenure on tenant farmers, and that such farmers, because of their inequality of bargaining power, required statutory protection in the making of contracts for the leasing of land. It followed that the remedy afforded by section 24(1) to tenant farmers was not merely a private right but a matter of public interest which Parliament had intended to protect from being bargained away or renounced in advance by an individual tenant. Therefore, despite the absence of express words prohibiting any contracting out, section 24(1) was mandatory in requiring a notice to quit not to have effect without the consent of an Agricultural Land Tribunal if a tenant served a counter-notice. The covenant in the lease was invalid as being contrary to public policy by virtue of being an attempt to oust the jurisdiction of the tribunal contrary to section 24(1)."

On page 56 Lord Simon stated as follows: —

"The principle which, in my view, emerges from this line of authority is as follows. Where it appears that the mischief which Parliament is seeking to remedy is that a situation exists in which relations of parties cannot properly be left to private contractual regulation, and Parliament therefore provides for statutory regulation, a party cannot contract out of such statutory regulation (albeit exclusively in his own favour), because so to permit would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provision a dead letter."

In *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.*[2] the Federal Court held that the booking *pro forma* was a firm contact as it identified the parties and specified the property to be bought and its price. It further held that the developers were bound by the Housing Developers (Control and Licensing) Rules, 1970 and only details could be inserted into any further agreement. Based on the authorities I have referred, I am of the opinion that the defendants cannot contract out of the Statutory provisions of the 1970 Rules.

The defence contends that the Common Law and other statute laws also apply. What they are saying is that under Common Law they are entitled to rely on Clause 32 of the said agreement which is an exception to rule 12(1)(r). Clause 32 reads as follows: —

"The Vendor shall not be liable to Purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed hindered or prevented by force majeure including but not limited to acts of God strikes lockouts riots civil commotion acts of war or the disability of contractors and sub-contractors employed by the Vendor either commencing, carrying on or completing their work or failure to obtain any necessary sanction or approval of any local or other appropriate authority or any other circumstances of whatsoever nature beyond the control of the Vendor."

Even assuming what they say is correct, on the facts and circumstances of the case they have failed to satisfy me that the delay was beyond their control. The defence called four witnesses. DW1 was the Site Manager of the defendant company for 8 years from 1972. He said that he was responsible for the construction of 1,395 units of phase 5 project which started in early 1974. There was a housing boom during that year and the defendant company began to encounter serious problems because of the boom as there was shortage of building materials. There was also a shortage of skilled and semi-skilled labourers. According to him the supply was not sufficient. This shortage went on until March 1976. Under cross-examination he stated that his duty as Site Manager was to construct based on the approved building plan given by the management. The defendant company engaged contract labourers, but the company are both developers and contractor. He further stated that before starting construction, he would study the site. He would know the materials and labour required. After determining all these the company would enter

into contract with the suppliers. As a Site Manager he would not know the arrangement, but it is the management who is responsible. Similarly the materials were ordered by the management. He only knows what he receives on the site. DW1 was only an employee of the defendant company. There was nothing that came out from his evidence that persuades me to make any finding that the reason for the delay in the completion of the building was due to something beyond the control of the defendant company. DW2, DW3 and DW5 gave evidence for the defence regarding the shortage of building materials in particular steel and cement. From their evidence I find that between 1974 and 1975 there was shortage of cement and according to DW5 in 1973 there was shortage of steel bars but supply in the market began to improve in 1974. Although there was shortage of cement which was very acute in 1975 until late 1976, according to DW5 consumers were allowed to import their own cement. Yet there was no evidence to suggest that the defendant company had taken steps to arrange for the importation of cement from abroad. In the circumstances of the present case, I am satisfied that the defendants had not shown they had taken all reasonable steps to get the supply of these materials in order to complete the phase 5 project in time. Phase 5 involved the construction of 1,395 units of houses of different types. Being a leading housing developer, the defendants are expected to plan and project the construction more professionally. The evidence of DW4, the Consultant Engineer fortifies my observation. Under cross-examination he stated that the developers did not bring up during the meeting regarding the availability of the materials and that his advice was not sought.

It should also be noted that the defendant company depended on the suppliers for the supply of building materials and labour. None of their suppliers was called to testify and to explain to the court their reason for failure to supply these materials. In the circumstances, I find that the defendants have failed to prove that the delay was due to circumstances beyond their control.

In my judgment the plaintiff is entitled to damages calculated at the rate of 8% per annum on the purchase price from July 2, 1975 to June 1, 1977 for $27,826.66 as pleaded in paragraph 9 of the statement of claim.

Now having arrived at this figure of $27,826.66, the plaintiff claims that she was entitled to a set-off. By a letter dated June 16, 1977 AB23 the defendants notified the plaintiff that the said building has been certified completed and asked her to pay a total sum of $17,907.20 being the balance of the purchase price and quit rent for four years at $401.80 per annum. Clearly, it is against this amount that the plaintiff sought to set-off her damages and demanded the balance thereof for $9,919.46. This is found in her undated letter to the defendant AB26. For the purpose of considering the question of set-off the plaintiff, *inter alia,* wrote as follows: —

"Could you kindly let me know whether you have obtained any extension of time from the Controller of Housing and if not why we should not be entitled to the liquidated damages of 8% on the purchase price. For the period from July 2, 1975 to June 1, 1977 the liquidated damages amount to $27,826.66.

You will note that the balance of $17,907.20 payable by me is far below what I may be entitled to as liquidated damages. Therefore, we suggest that you hand us the keys first as I am *prima facie* entitled to payment of $9,919.46 which should also be forwarded to me."

In her evidence the plaintiff stated that she wrote to the defendant requesting for setting-off against the last payment. When referred to by counsel for the defendant the letter AB26 she agreed that she did not use the word set-off but maintained that at the point of time the set-off has operated. She agreed with counsel's suggestion that she was merely making an enquiry because she believed that she would be entitled to 8% damages. From the evidence I find that the plaintiff's undated letter AB26 to the defendant was more than a basic enquiry. To all intents and purposes, the plaintiff was already exercising her right of set-off from the time she wrote this letter as it is clearly stated that she was entitled to payment of $9,919.46 which is actually the difference between the liquidated damages and final payment and the quit rent.

Counsel for the defendant has submitted that the right of setting-off can only be pleaded by a defendant. He cited a number of authorities which say that a set-off may only be pleaded as a defence. The history of set-off can be found in *Hanak* v. *Green.*[3] This was also considered in *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.*[4] The defence of set-off may be raised in respect of debts or damages, whether the amount is ascertained or not and whether it is added as a counterclaim. "It may consist of a set-off of mutual debt or the setting up of matters of complaint, which if established, would reduce or even extinguish the claim or the setting up of an equitable set-off" *per* Morris L.J. at 23 in *Hanak* v. *Green, supra.* Again on page 26 Morris L.J. stated: "The question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings."

With respect I do not agree that a set-off can only be pleaded by a defendant. As a set-off is essentially in the nature of a crossclaim for debt or damages which may be raised as a defence to the claim made in the action, I am of the view that there are circumstances where even a plaintiff may be in the position of a defendant. Thus in the instant case, the plaintiff received a notice AB23 from the defendant requesting her to pay the sum of $17,907.20. In her reply AB26 she claimed that as she was entitled to liquidated damages for $27,826.66, she would therefore be entitled to set-off the said amount against the amount claimed by the defendant. Hence, she is only claiming for $9,919.46. In *Gilbert Ash (Northern) Ltd.* v. *Modern Engineering (Bristol) Ltd.*[5] the defendant is entitled to set-off or set-up against the amount claimed as the price of goods sold and delivered or work and labour done any damages which he has suffered as a result of the plaintiff's breach of that contract. This case was followed in *Alliance (Malaya) Engineering* v. *San Development.*[6] On the authorities and principles to which I have referred, it seems to me the plaintiff has a right of set-off.

The defendant has also argued that the plaintiff was in breach of the said agreement due to her failure to comply with the demand of the defendant to pay the balance of the purchase price for $17,907.20 AB23. This is pleaded in paragraph 12 of the defence. And under Clause 21 of the said agreement, if the purchaser shall fail to pay any instalment of the total purchase price or any part thereof, or any interest, then it shall be lawful for the vendor at any time thereafter to annul the sale and forthwith terminate the agreement. With respect, although this was pleaded in the defence, there was no evidence that the defendant had taken any positive steps to terminate the agreement. However, it was only about three months after the writ was filed and served on the plaintiff that the defendant's solicitors wrote to the plaintiff terminating the said agreement. This letter dated January 26, 1978 was not agreed by parties, but was only included in the defendant's bundle of documents. No witness was called to produce this letter. Be that as it may, from counsel's submission, I am of the view that the defendant did not take up this point seriously. What they are contending now is that the plaintiff's conduct by refusing to pay the last balance amounted to rescission of the said agreement. It is my finding that the failure on the part of the plaintiff to pay the balance does not amount to a repudiation of the contract. The reply by her AB26 to the defendant's letter of demand AB23 cannot be construed as her intention to repudiate. What she wanted to do was merely to set-off the amount she was entitled to as liquidated damages against the balance of the purchase price due to the defendant. At any rate, the defendant has not pleaded that the plaintiff has repudiated the contract or that the defendant has accepted the repudiation. "The act and conduct of the defaulting party relied on as amounting to a repudiation of the contract should be clearly pleaded and it is necessary to plead and prove that the repudiation was accepted.". *Bullen Leake & Jacob's* Precedents of Pleadings, 12th Edition, p. 352.

The plaintiff also claims for loss of use and enjoyment of the said building by way of rental at $2,400 per month from June 16, 1977 to the date of delivery of vacant possession. With regard to the rental, the plaintiff said in her evidence that she enquired from the developers' office in Kuala Lumpur and was informed that the rental would be $2,500 per month. The plaintiff did not call other witnesses or produce any document to substantiate her claim. The onus of proving her loss rests with the plaintiff. "Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damages; it is not enough to write down particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it" *per* Lord Goddard C.J. in *Bonham-Carter* v. *Hyde Park Hotel.*[7] The same observation was made by Thomson L.P. in *Sum Kum* v. *Devaki Nair & Anor.*[8]

In the circumstances, the plaintiff has failed to prove her loss of use and occupation of the said building by way of rental. Therefore with the exception of her claim for the loss of use and occupation of the said building, I allow the plaintiff's claim for the sum of $9,919.46 being the balance of liquidated damages with interest as prayed. I also order that the said property be transferred to the plaintiff within 3 months and costs.

Order accordingly.

Solicitors: *Sethu, Ghazali & Gomez; Kadir, Tan & Ramli.*

KANIAMMAL v. MOHAMED HANIFFA

[O.C.J. (Arulanandom J.) May 5, 1980 & April 13, 1981]
[Penang — Civil Suit No. 717 of 1976]

Practice and Procedure — Defence — Application for defence to be struck out — Triable issues of fact and law — Application disallowed.

This was an application to strike out the defence of the defendant on the grounds that it disclosed no reasonable answer or defence to the plaintiff's claim, in law and in fact. The suit was first commenced against the defendant/respondent by one Minachi for an injunction restraining him from residing or remaining on land and premises known as Lot 1139 together with premises No. 3 Kampong Herriet and damages and costs. After the death of the original plaintiff, the present plaintiff was substituted with the leave of court as plaintiff and the sole executrix of the original plaintiff's will.

Held, dismissing the application: there were issues both of fact and law and this was not a case where the defence should be struck out or the defendant allowed to defend only on payment of a sum of money into court.

CIVIL SUIT.

R. Rajasingam for the applicant.

S.P. Annamalai for the respondent.

Arulanandom J.: This was an application by the applicant for the following orders against the respondent: —

"(1) For an Order that the defence of the defendant abovenamed in this action be struck out and for judgment to be entered forthwith for the plaintiff abovenamed in terms of the plaintiff's claims as set forth in the Statement of Claim herein with costs, on the grounds that the said defence of the defendant discloses no reasonable answer or defence at all to the plaintiff's claims herein, in law and in fact;

(2) In the alternative, for an Order that on the defendant paying into court within seven (7) days from the date of the Order to be made hereon, the sum of $6,300, being the alleged monthly rentals of the said premises No. 3, Kampong Herriet, Penang, the subject-matter of the action herein, from July 16, 1972 to date at the alleged rate of $70 a month, the defendant be allowed to defend the action herein and an early date of hearing be fixed therefor; but on the defendant failing to do so within the said seven (7) days from the date of the Order to be made hereon, then immediately thereafter, judgment be entered for the plaintiff as claimed in the Statement of Claim herein, with costs."

The suit was first commenced against the respondent by one Minachi @ Sinnammal d/o Supparayan alias S. Sinnammal a/p Suparayan deceased for an injunction restraining him from residing or remaining on land and premises known as Lot 1139 Town Subdivision 4, N.E.D. of Penang together with premises No. 3 Kampong Herriet and Damages and Costs. After the death of the original plaintiff, the present plaintiff was substituted with the leave of the court as plaintiff and the sole executrix of the original plaintiff's Will.